

Decision 173/2007 Ms Mary Fawcett and West Lothian Council

*Request for names and addresses of children's panel members
in West Lothian*

**Applicant: Ms Mary Fawcett, Membership Secretary
of the Scottish Association of Children's Panels
Authority: West Lothian Council
Case No: 200700366
Decision Date: 25 September 2007**

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 173/2007 Ms Mary Fawcett, Membership Secretary of the Scottish Association of Children's Panels and West Lothian Council

Request for names and addresses of children's panel members - information withheld – application of section 38(1)(b) of FOISA upheld by the Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 16 (refusal of request); 19 (content of certain notices); 38(1)(b) and 38(2)(a)(i) and (b) (Personal information).

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretive provisions); part 1 of schedule 1 (The data protection principles); schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Children (Scotland) Act 1995: Schedule 1, paragraph 12

Facts

Ms Mary Fawcett, the Membership Secretary of the Scottish Association of Children's Panels (SACP) requested the names and addresses of the members of the children's panel in West Lothian from West Lothian Council (the Council). The Council responded by supplying a list of the names of panel members but did not release their addresses. Ms Fawcett was not satisfied with this response and asked the Council to review its decision. The Council carried out a review and subsequently notified Ms Fawcett that it considered the information to be exempt under the terms of section 30(c) of FOISA. Ms Fawcett remained dissatisfied and applied to the Commissioner for a decision.

In the course of the investigation, the Council subsequently submitted that the exemption in section 38(1)(b) of FOISA was also applicable to the information withheld from Ms Fawcett.



The Commissioner found that the Council had generally dealt with Ms Fawcett's request for information in accordance with Part 1 of FOISA. In particular, he found that the addresses of panel members were exempt from disclosure under the terms of section 38(1)(b) of FOISA. He found that the Council had breached certain technical requirements of Part 1 of FOISA, but he did not require the Council to take any action.

Background

1. On 24 January 2007, Ms Fawcett wrote to the Council requesting the following information: the names and addresses of the members of the children's panel for its local authority area.
2. On 26 January 2007, the Council wrote to Ms Fawcett in response to her request for information. The Council supplied a list of children's panel members. No addresses were supplied.
3. On 2 February 2007, Ms Fawcett wrote to the Council requesting a review of its decision. In particular, Ms Fawcett drew the Council's attention to the fact that she had specifically requested the names and addresses of panel members.
4. On 2 February 2007, the Council responded to Ms Fawcett and advised her that her original request was not considered to be a request under FOISA and therefore would not be reviewed. The Council advised Ms Fawcett that if she wished to submit a request for the information under FOISA, she would be entitled to do so but that the Council's response would be the same i.e. the information would not be released.
5. On 6 February 2007, Ms Fawcett wrote to the Council pointing out that its own website states that there is no requirement for an applicant under FOISA to cite the law or to state explicitly that they are making an information request under FOISA.
6. On 22 February 2007, the Council wrote to Ms Fawcett advising her that the addresses of panel members were being withheld under the exemption contained in section 30(c) of FOISA, which applies to information where disclosure would or would be likely to prejudice the effective conduct of public affairs. The Council also advised Ms Fawcett that it considered the public interest in disclosing the information was outweighed by that in maintaining the exemption.



7. On 11 March 2007, Ms Fawcett wrote to my Office, stating that she was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Ms Fawcett had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.

The Investigation

9. On 1 May 2007, the Council was informed that a valid application had been received from Ms Fawcett and was asked to provide my office with specified items of information required for the purposes of the investigation. The Council responded with the information requested on 12 June 2007. The case was then allocated to an investigating officer.
10. On 5 July 2007, the Council was asked to comment on the matters raised by Ms Fawcett in terms of section 49(3) of FOISA and to respond to specific questions on the application and its reasoning when applying the exemption under section 30(c) of FOISA to the information withheld.

Submissions by the Council

11. The Council responded on 23 July 2007. It reiterated its assertion that the exemption in section 30(c) applied and that the public interest lay in withholding the information.
12. The Council stated that it is required to constitute and maintain a children's panel in terms of the Children (Scotland) Act 1995. It went on to explain that the decisions taken by the panel can have profound implications for individuals who may not agree with the decisions taken.
13. The Council considered that to list the home addresses of panel members would expose them to very real risks of exposure to the parties affected by the outcome of the panel system outwith the safety of the hearing room. As a consequence, the Council considered that the continued delivery of an effective children's panel would be at risk should panel members feel unable or unwilling to continue in their work in the event of their home addresses being made available. Overall, the Council argued that its ability to effectively conduct its affairs would be substantially prejudiced.



14. In relation to the public interest test required in terms of section 2(1)(b) of FOISA, the Council considered that the public interest in disclosing the information was outweighed by that in maintaining the exemption.
15. The Council's submissions also stated that it considered the exemption in section 38(1)(b) to apply to the information withheld from Ms Fawcett. It considered that the information constituted the personal data of the individuals concerned and that disclosure would breach the first data protection principle. The Council also considered that disclosure would breach the second data protection principle.

Submissions by the applicant

16. In her submissions, Ms Fawcett stated that she had made the request for information in her capacity as membership secretary of the Scottish Association of Children's Panels (the SACP).
17. Ms Fawcett explained that the SACP is a body that is sanctioned and funded by the Scottish Executive (Scottish Ministers) and is made up of members of the children's panel. It provides a forum for panel members across Scotland to raise and discuss issues relating to the children's hearing system.
18. Ms Fawcett stated that there are currently twenty three areas represented on the SACP or in the process of electing a representative. Ms Fawcett also stated that in each of these areas, the SACP representative has access to the personal contact details of all of their fellow panel members in that area.
19. Ms Fawcett stated that she was not asking for panel members' addresses "to be open for public inspection", but was asking for the information to be released solely to the SACP.
20. In response to this point, my Office advised Ms Fawcett that FOISA provides the same rights of access to all, and that information disclosed under this law should generally be considered to be placed in the public domain. In the light of this, and the terms of her application, Ms Fawcett was asked to confirm whether she wished to continue pursue her application under the terms of FOISA.
21. Ms Fawcett confirmed that she still wished to pursue her application, and in particular, she still wished to make the case that the SACP could be given special status enabling the addresses of panel members to be made available to her organisation without wider public disclosure.



22. Ms Fawcett also made reference to Schedule 1, paragraph 12 of the Children (Scotland) Act 1995. This states that: "Each local authority shall publish a list of names and addresses of members of the children's panel for their area, and that list shall be open for public inspection at the principal offices of the local authority, and at any place where an electors list for the local government area is available for inspection".
23. On 24 July 2007, the investigating officer advised Ms Fawcett that the Council was additionally relying on the exemption contained in section 38(1)(b) and invited her to submit comments on this matter.
24. On 26th July 2007, Ms Fawcett telephoned the investigating officer and stated that she did not wish to make any fresh representations in addition to those previously submitted.

The Commissioner's Analysis and Findings

25. In coming to this decision, I have considered all of the information and the submissions that have been presented to me by both Ms Fawcett and the Council and I am satisfied that no matter of relevance has been overlooked.
26. I will initially consider the Council's application of the exemption contained in section 38(1)(b) of FOISA.

Application of section 38(1)(b)

27. Under section 38(1)(b) of FOISA (read in conjunction with section 38(2)(a)(i) or 38(2)(b)), information is exempt information if it constitutes personal data and the disclosure of the information to a member of the public otherwise than under FOISA would contravene any of the data protection principles contained in schedule 1 to the DPA.
28. In this case, the Council has stated that disclosure under FOISA of the information requested by Ms Fawcett would breach the first and second data protection principles.
29. In considering this exemption, I am required to consider two separate matters: firstly, whether the information under consideration is personal data and, if so, whether the release of the information to Ms Fawcett would indeed breach any of the data protection principles.



30. It must be borne in mind that this particular exemption is an absolute exemption. This means that it is not subject to the public interest test contained in section 2(1)(b) of FOISA.

Is the information under consideration personal data?

31. “Personal data” are defined in section 1(1) of the DPA as follows:

“data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

32. A person’s address, is quite clearly information that relates to them and their private life in a significant sense. In the circumstances of this case, I am satisfied that the addresses of panel members constitute personal data under the terms of the DPA.

Would the release of the information breach the first data protection principle?

33. I will now consider whether disclosure of this personal data would breach the first data protection principle.
34. This states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 (of the DPA) is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 (of the DPA) is also met.
35. I have considered the definition of “sensitive personal data” in section 2 of the DPA and do not consider that the information sought by Ms Fawcett falls into this category.
36. Section 1(1) of the DPA interprets “processing” as including “disclosure of the information or data by transmission, dissemination or otherwise making available...”



37. According to guidance from the Information Commissioner (“Freedom of Information Act Awareness Guidance No 1”, which can be viewed at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detail_ed_specialist_guides/awareness_guidance%201%20personal_information_v2.pdf), the assessment of fairness includes looking at whether the third party would expect that his/her information might be disclosed to others and/or whether the third party would expect that his/her information would be kept private. In addition, this guidance also states that:
- “Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.”
38. In its submissions to my Office, the Council has stated that it does not consider that any of the conditions in Schedule 2 of the DPA apply in this case.

Is it fair to release the addresses of panel members?

39. In its letter to Ms Fawcett dated 22 February 2007, the Council advised Ms Fawcett that panel members could be contacted through the Council or the panel chair. In its submissions to my Office, the Council stated that it has been the practice of a large majority of Clerks to children’s panels to interpret paragraph 12 of Schedule 1 of the Children (Scotland) Act 1995 as not requiring home addresses of panel members to be released. Instead, the business address i.e. c/o the Clerk to the children’s panel has been used.
40. I note that paragraph 12 of Schedule 1 of the Children (Scotland) Act 1995 refers merely to “names and addresses of members of the children’s panel...” and does not specify that the “home” address is required.
41. In the circumstances, I would tend to agree with the Council’s view that the policy intention of the Children (Scotland) Act 1995 could be met by the use of a business address and there is no overriding requirement to provide a home address.
42. As previously noted in paragraph 13 of this decision notice (albeit in relation to the Council’s submissions regarding the exemption under section 30(c) of FOISA), the Council has expressed its fears regarding the safety of panel members outwith the hearing room were this information to be released.
43. Having considered the information provided to my Office, I accept that the expectations of the individuals concerned would be that the information about their home addresses would not be disclosed without their consent.



44. In all the circumstances of the case, I am satisfied that disclosure of the addresses of the members of the West Lothian children's panel would constitute unfair processing for the purposes of the first data protection principle. Therefore, I have concluded that the exemption in section 38(1)(b) of FOISA does apply to the information requested by Ms Fawcett.
45. In reaching this view, I have noted all the comments made by Ms Fawcett, and I have also considered whether any of the conditions set out in Schedule 2 of the DPA might be met in this case. It is my view that condition 6 of Schedule 2 of the DPA is the only condition which might be considered to apply in this case. Condition 6 enables processing (for example by disclosure) to be considered fair for the purposes of the first data protection principle where it is necessary for the purposes of legitimate interests pursued by the third party to whom information is disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights or freedoms or legitimate interests of the data subject.
46. I accept that Ms Fawcett, in her capacity as an Office Bearer in the SACP has a legitimate interest in being able to communicate freely with panel members throughout Scotland.
47. I have also taken cognisance of the provisions of paragraph 12 of Schedule 1 of the Children (Scotland) Act 1995 which provide that a local authority shall publish a list of names and addresses of panel members which shall be open for public inspection. The existence of this provision shows that there is also a wider general legitimate interest in providing a means for members of the public to contact members of a children's panel. However, I also note that there is already provision in place to allow communication with panel members via correspondence addressed c/o the clerk to the children's panel.
48. The work undertaken by members of children's panels is of a nature that can have a significant effect on the lives of the individuals involved. Where a person wishes to make contact with panel members, I consider it reasonable that they are expected to do so via the Council rather than in a manner that may make an unwarranted intrusion into that panel member's privacy or private life.
49. In this case, I believe that public disclosure of the addresses of the panel members would be unwarranted because the legitimate interests of those panel members outweigh those of a member of the public in accessing this information. Therefore the test contained in paragraph 6 of schedule 2 of the DPA cannot be met in this case.
50. However, Ms Fawcett has indicated that she is not asking for the addresses of panel members to be open for public inspection but to be made available only to the SACP for the purpose of informing panel members of the existence and activities of the SACP.



51. I have considered this point, but I am not able to order the disclosure of the addresses of panel members on such a privileged basis, even if I accepted that it would be fair to make this information available to the SACP only. Once information is disclosed under FOISA, there is no requirement that it is kept confidential by the recipient, or restricted only to that recipient. It is clear that FOISA assumes that information released under its terms is effectively put into the public domain and would be available to any other person who asked for the same information.
52. Therefore, while there is nothing to prevent a public authority from reaching agreements providing for the limited disclosure of information to individuals or organisations as they consider appropriate, such disclosures would not be appropriate under the terms of FOISA.
53. In the circumstances, I therefore conclude that it would be unfair to disclose the addresses of panel members to Ms Fawcett as a representative of SACP for the same reasons set out above as to why it would be unfair to disclose this information under the terms of FOISA to any other person.
54. As I have concluded that the exemption in section 38(1)(b) applies and that disclosure of the information would contravene the first data protection principle, I will not go on to consider whether disclosure would contravene the second data protection principle.
55. I will also not consider in this case whether the Council was justified in applying the exemption under section 30(c) of FOISA.

Technical breaches of FOISA

56. As noted at paragraph 4 above, following Ms Fawcett's request for a review of the Council's decision to withhold the addresses of panel members, the Council's response indicated that her original request was not considered to be a request under FOISA and would therefore not be reviewed. Ms Fawcett was advised by the Council to submit a new application for the same information under FOISA.
57. As Ms Fawcett correctly pointed out to the Council, there is no requirement in FOISA for an applicant to specifically cite the Act when requesting information. This is confirmed in paragraph 16 of the Explanatory Notes which accompany FOISA.
58. In its submissions to me, the Council has acknowledged that Ms Fawcett's original request of 24 January 2007 should have been treated as a request under FOISA.
59. In terms of section 16 of FOISA (refusal of request), if a request for information is to be refused, a Scottish public authority must set out, in terms of Part 1 of FOISA, why that request is being refused.



60. If information is withheld because an exemption in Part 2 of FOISA is judged to apply, a refusal notice under the terms of section 16 of FOISA must be issued to the applicant. The notice must specify the relevant exemption and the authority's reasons for relying on it.
61. In this case, information was clearly held by the Council and was considered exempt by the Council. Consequently, in its initial response to Ms Fawcett, the Council should have set out, in accordance with section 16(1) of FOISA, the reasons why it considered that Ms Fawcett's request should be refused, specifying the exemption(s) it considered to apply.
62. In failing to do so, I find that the Council failed with regard to its obligations under section 16(1) of FOISA.
63. Section 19 of FOISA requires that when notifying an applicant in terms of section 16 of FOISA that the information requested is considered exempt information, the notice should provide details of:
 - (a) the authority's procedure for dealing with complaints about the handling of requests for information;
 - (b) the right to request a review in terms of section 20 of FOISA; and
 - (c) the right to make an application for a decision by the Scottish Information Commissioner under section 47(1) of FOISA.
64. The Council's initial response to Ms Fawcett did not contain any of the particulars detailed in paragraph 63 above. I therefore find that the Council failed to comply with the requirements of section 19 of FOISA.
65. The Council has subsequently provided me with details of its policies for dealing with information requests. I am satisfied that these provide adequate guidance for staff to identify requests for information under FOISA and accordingly, I do not require the Council to take any further action in this regard. I would however encourage the Council to ensure that all staff are aware of this guidance and that it is implemented properly in future.



Decision

I find that West Lothian Council (the Council) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Fawcett.

I find that the Council correctly applied the exemption in section 38(1)(b) of FOISA to the information withheld from Ms Fawcett.

However, in failing to recognise a valid request for information under FOISA and in failing to respond appropriately to Ms Fawcett's request for information, I find that the Council breached the technical requirements of sections 16(1) and 19 of FOISA.

I do not require the Council to take any action in response to this decision.

Appeal

Should either Ms Fawcett or West Lothian Council wish to appeal against this decision, there is a right of appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
25 September 2007



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
 - (a) the provision does not confer absolute exemption; and
 - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
 - (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.



- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

...

- (6) Subsections (1), (4) and (5) are subject to section 19.

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

- (a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
- (b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles; or



...

- (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

Data Protection Act 1998

1 Basic interpretative provision

- (1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

SCHEDULE 1

THE DATA PROTECTION PRINCIPLES

PART I

THE PRINCIPLES

- 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 - (a) at least one of the conditions in Schedule 2 is met,

...



2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

...

- 6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

Children (Scotland) Act 1995

SCHEDULE 1

CHILDREN'S PANELS

...

12. Each local authority shall publish a list of names and addresses of members of the children's panel for their area, and that list shall be open for public inspection at the principal offices of the local authority, and at any place where an electors list for the local government area is available for inspection.